Jonbruni, Inc., d/b/a Temptations *and* Hima Narumanchi and Tracy Buel. Cases 20–CA–28393 and 20–CA–28525

December 20, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND WALSH

On November 2, 1999, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief opposing the exceptions. Additionally, the Charging Parties and the Respondent filed cross-exceptions, and the Respondent filed a brief supporting its cross-exceptions.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

We find it unnecessary to consider the judge's finding that the Respondent's dancers are employees within the meaning of Section 2(3) rather than independent contractors. Assuming for purposes of disposition of this case that the dancers are statutory employees, we agree with the judge's determination that the Respondent's annual gross volume of business does not meet the Board's retail standard for discretionary jurisdiction.

The jurisdictional issue the judge decided was whether compensation paid by the Respondent's customers directly to employees—in this case the dancers' tips and fees—should be included in calculating the Respondent's gross volume of business. As fully set forth in her decision, the judge found it inappropriate to include these funds, relying primarily on *Love's Wood Pit Barbecue Restaurant*, 209 NLRB 220 (1974). The relevant holding in *Love's* is that employer deductions from employees' pay for tips (so-called "tip credits") do not count in the calculation of the employer's gross business volume because the tips themselves—a part of employees' compensation paid by customers—do not count in these calculations. Id. at 221.

Our dissenting colleague would assert jurisdiction, relying primarily on certain cases from the taxicab industry. Those cases, as interpreted by our colleague, do cast some doubt on the propriety of excluding this kind of employee compensation from gross volume calculations. However, in those cases the Board did not address explicitly the question of customer-paid employee compensation, such as tips, in the context of gross business volume. In contrast, the Board in *Love's* did explicitly consider the central issue presented in this case.[2] Following *Love's*, moreover, is consistent with the Board's basic policies regarding discretionary jurisdiction.

Siemons Mailing Service, 122 NLRB 81 (1958), is the seminal Board decision concerning current discretionary jurisdictional standards. The Board observed there that the goal of these standards was a more efficient focus of the Board's resources on the resolution of substantive legal issues. This would be accomplished because the new, bright-line standards would avoid the protracted investigation and litigation of preliminary jurisdictional matters that had plagued the Board in the past. Id. at 83–84. In a companion case to *Siemons*, *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1958), the Board established the current discretionary standard for retail enterprises: $500,000 in gross volume of business. Consistent with the *Siemons* goal of swift determination of discretionary jurisdictional questions, the Board noted that the new standard dispenses with previous, time-consuming methods of evaluating retail jurisdiction, because gross business volume calculations "are readily obtainable and their production places no hardship upon employers." Id. at 89.

In this case, considerable time and resources have been spent in litigating the question of whether the dancers' tips and fees should be calculated in the Respondent's gross volume of business. It is fair to assume that considerable resources were also spent in investigating this question. The protracted nature of this preliminary, nonsubstantive litigation has been due in large part to the fact that the funds in question were never in the Respondent's possession, and thus the calculations were not "readily obtainable."

As indicated above, our dissenting colleague's position lacks controlling support in Board precedent. In addition, by advocating an assertion of jurisdiction based on the record in this case, he is endorsing an approach which is, at the very least, inconsistent with *Siemons*, *Carolina*, and fundamental Board jurisdictional policy.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We see no basis for distinguishing *Love's* on the basis that tip income there was only part of employees' compensation. The issue is whether customer-paid employee compensation must be counted toward gross business volume. What matters is the form of the compensation, not the proportion of an employee's total earnings that it represents.

Nor does it matter that the tip credits in *Love's* were deducted from employee paychecks. A deduction from employee pay constitutes more revenue for the employer, and yet that revenue was not considered as gross business volume for jurisdictional purposes.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Dated, Washington, D.C. December 20, 2001

Peter J. Hurtgen,, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting.

The consolidated complaint in this case alleges that the Respondent violated Section 8(a)(1) of the Act by terminating alleged discriminatee Hima Narumanchi and by refusing to reinstate alleged discriminatee Tracey Buel because of their activities on behalf of the Exotic Dancers Alliance and other protected, concerted activity. However, the judge did not resolve these issues. After counsel for the General Counsel presented his case in chief, the judge granted the Respondent's motion to dismiss the complaint. In this regard, although the judge found that Narumanchi and Buel were statutory employees entitled to the protection of the Act, and not independent contractors as the Respondent contended, she further found that the Respondent's gross annual income did not satisfy the Board's discretionary jurisdictional standard for retail stores ($500,000), which the parties agreed is applicable here. My colleagues summarily adopt the judge's dismissal of the complaint.

Contrary to the judge and my colleagues, I find that the Respondent's gross annual income satisfies the Board's discretionary jurisdictional standard and that therefore the Board should assert jurisdiction here. As set forth below, the judge erroneously failed to consider the monies received by the dancers themselves as compensation for the purposes of determining whether the Board should exercise its discretion to assert jurisdiction**.** The judge's conclusion was based both on a misreading of Board precedent, and on a failure to fully appreciate that the purposes behind the Board's discretionary jurisdictional standards would be best served by including the receipts of the dancers in that determination. Because, as the judge acknowledged, the Respondent's total receipts clearly satisfy the Board's retail standard for asserting jurisdiction if the receipts of the dancers are included, I would reinstate the consolidated complaint and remand the case to the judge for resolution of the 8(a)(1) allegations contained therein.

As an initial matter, I agree with the judge that Narumanchi and Buel are statutory employees entitled to the protection of the Act. In reaching this conclusion, I rely especially on the judge's findings, in applying the analysis set out in the Restatement (Second) of Agency, Section 220, that the Respondent is in business as a club providing erotic dance performances, that "[t]he dancers 'are' the [Respondent's] business," and that "absent exotic dancers, Respondent would not be in business." I rely on these factors especially because where the performances of individuals is the "product" of the business, where, indeed, as here, the performances are the business, there is a strong mutual interest between the owners of the business and the performers who produce its "product" to ensure the success of the business. In these circumstances, it would flaunt reality to define the exotic dancers as *independent* contractors.

Having found that the exotic dancers, including Narumanchi and Buel, the alleged discriminatees here, are statutory employees entitled to the Act's protection, the judge then deprived them of that protection by finding that the Respondent's gross annual income did not satisfy the Board's discretionary jurisdictional standard for retail stores.[1] Contrary to the judge, I find that the Respondent's gross annual income satisfies the Board's discretionary standard.

The issue here is whether the Board should include the dancers' compensation in the Respondent's gross annual income for the purpose of determining whether the Respondent satisfies the Board's discretionary jurisdictional standard of $500,000. My colleagues adopt the judge's finding that this compensation should not be so included. I disagree.

The facts, in brief, are as follows. The parties stipulated that the Respondent's gross revenues for 1997 were $352,221.96. This amount includes the $50 performance or stage fee which the dancers pay to the Respondent each evening that they perform, but does not include the dancers' compensation, which the judge found to be $162,000 for calendar year 1997. As to the dancers' compensation, the dancers receive "tips" from the Respondent's customers.[2] The dancers also receive fees from individual customers with whom the dancers arrange to perform lap dances. (While the dancers arrange with customers on an individual basis the amount of the lap dance fees, the Respondent sets the parameters for

[1] As explained by the judge at fn. 11 of her decision, the Respondent admitted, in effect, that it satisfies the Board's statutory jurisdictional standard and therefore that is not an issue here.

[2] I shall use the term "tips" to denote the moneys which the dancers receive for their dance performances from customers because that is the term used by the judge in her decision. However, the term "tips" is misleading because it implies that the dancers receive compensation from the Respondent and that the "tips" are simply an addition to that income, much as tips are additional income to waiters and waitresses. However, that is not the case here. The dancers' "tips," along with their lap dance fees (see above), are the dancers' sole source of income. Thus, the "tips" which the dancers receive from customers are the dancers' compensation, not an addition to their compensation. As explained below in the discussion of *Love's Wood Pit Barbecue Restaurant*, 209 NLRB 220 (1974), the judge failed to make this distinction and therefore erred in her analysis of that case.

those fees and the Respondent also offers customers lap dance sales, i.e., two lap dances for the price of one, without prior notice to the dancers.)

While the judge found that the $50 performance or stage fees which the dancers paid to the Respondent should be included in the Respondent's gross annual income, she further found that the rest of the dancers' compensation,[3] the tips and lap dance fees which they received from customers, should not be included in the Respondent's gross annual income. The judge's sole basis for reaching this conclusion was that the employees' compensation goes directly to the employees from the Respondent's customers rather than first to the Respondent and then to the employees.

For the reasons explained below, I find that the judge erred in her analysis of the relevant cases and that, based on her misreading of those cases, she made analytically determinative the fact that the dancers did not pass on to the Respondent the money which they received as tips and lap dance fees. Since a proper reading of these cases establishes that this fact is analytically meaningless in resolving the issue presented, the judge reached the wrong conclusion.

While the judge found that "[n]one of the authorities cited [by counsel for the General Counsel and the Respondent] is clearly controlling," she found specifically that the taxicab cases relied on by counsel for the General Counsel, *Supreme, Victory, & Deluxe Cab Cos.*, 160 NLRB 140 (1966) (*Supreme*), and Major *Cab Co.* 255 NLRB 1383 (1981),[4] were not analogous to the present case. Rather, she found that in those cases, *Supreme* and *Major Cab*, the taxicab drivers passed their fares on to the companies and that it was on that basis that the drivers' fare receipts were included in the companies' gross annual income. As explained below, the judge's analysis of these cases is flawed because she clearly erred in finding that the taxicab drivers, the employees, passed their fare earnings on to the companies, the employers.

In *Supreme*, the taxicab companies, which the Board found to be a single employer, stated that their only income was from the franchise fees which the cab owners paid to the companies and from the sale of gasoline to the taxicab drivers. Since the amount of the franchise fees ($129,360 annually) and the amount of the gasoline sales ($92,708) did not satisfy the Board's discretionary standard of $500,000, the Board considered whether it would be appropriate to include the gross receipts of all the drivers (i.e., the rent-drivers and driver-owners) in determining whether the companies' volume of business satisfied the Board's discretionary jurisdictional standard. The Board found that it would be appropriate to include the drivers' gross receipts in making this determination because "the relationship which exists between the Companies and the rent-drivers and driver-owners is one of employment." *Supreme*, 160 NLRB at 143–144 (footnote omitted).

Since the companies had no record of the taxicab owners' and drivers' gross receipts, the Board subpoenaed the taxicab owners and drivers to testify about their income. Not all drivers responded to the subpoenas, and, of those that did, the testimony varied widely. Taking into account the credited testimony and making projections therefrom, the Board found that the full-time drivers' gross combined receipts would total $264,000 annually and that the part-time drivers' gross receipts would not be less than $271,752 annually. Adding all the receipts together gave a total of at least $535,752, substantially more than the required $500,000.

The Board went on to explain that the correctness of these calculations and projections was supported by the fact that if the amounts which the drivers paid to the companies for the franchise fees and gasoline were subtracted from their gross receipts, the estimated gross income of the drivers would be $313,752, or $3200 per taxicab. The Board found, in effect, that this amount was appropriate because from it the owners would have to "obtain sufficient money to cover the cost of depreciation, repairs, new tires, and batteries. . . . [and] at least 48 full-time drivers and some 67 part-time drivers must derive earnings for their work." Id at 146 (footnote omitted).

Having found that the companies satisfied the Board's discretionary jurisdictional standard, the Board also asserted jurisdiction on another basis. Citing *Tropicana Products, Inc.*, 122 NLRB 121 (1958), the Board stated "that where statutory jurisdiction exists [the Board] will assert jurisdiction in any case in which an employer has refused, upon reasonable requests by Board agents, to provide the Board or its agents with information relevant to the Board's jurisdictional standard." *Supreme*, 160 NLRB at 146. However, the Board went on in *Supreme* to distinguish that case from *Tropicana* on the ground that the companies in *Supreme* had "not refused to give information in the sense that they had declined to produce that which they are *capable* of producing." Id. (Emphasis added.) Rather, the Board found that the "net effect" of the absence of records and failure to respond to subpoenas upon the Board's ability to discharge its statu-

[3] I find that the $50 stage fees which the dancers pay to the Respondent should be included in the dancers' compensation because it is clear that the dancers pay the $50 stage fees out of the money which they receive from customers each evening. That is, although on some evenings dancers may not be able to cover the stage fee out of the money they earn that evening, as a general rule the dancers must be able to pay the $50 stage fee out of their earnings for that evening or they would never earn any money at all.

[4] Although the judge also discussed *Checker Cab Co.*, 141 NLRB 583 (1963), I find that case distinguishable because while here the issue is whether the compensation of *employees* should be attributable to the employer, there the Board specifically found "Checker and each of its members to be *joint employers* . . . and therefore deem[ed] it appropriate to combine the gross revenues of all members for jurisdictional purposes." Id. at 587 (footnote omitted, emphasis added).

tory functions was little different from the refusal to supply information involved in *Tropicana*. Id.

From this discussion, it is apparent that the companies in *Supreme* never received the taxicab owners' and drivers' gross revenues, i.e., their fares, because if they had, the issue would never have arisen in the first place as to whether it was appropriate to include the drivers' gross revenues in determining the companies' gross annual income. That is, if the companies had received the drivers' fares, those revenues would automatically have been included in the companies' gross annual income without discussion, just as the income from franchise fees and gasoline sales were included. Thus, only the fact that the companies never received the drivers' gross revenues can explain why the Board had to resolve the issue of whether it was appropriate to include those revenues in calculating the companies' gross revenues. Further, the fact that the Board specifically explained in its analysis of the *Tropicana* issue that the companies had not refused to supply this information, but were simply not "capable" of producing it, supports a finding that the companies never received the drivers' gross revenues. The Board nevertheless found that those revenues should be included in calculating the companies' gross revenues because the taxicab owners and drivers were the employees of the companies. *Major Cab Co.*, supra, is not to the contrary.[5]

Thus, contrary to the judge's reading of both *Supreme* and *Major Cab Company*, a proper reading of these cases establishes that the taxicab owners and drivers did not pass their fares to the companies. These cases are therefore analogous to the present case and require a finding here that the compensation of the dancers, who are, after all, employees of the Respondent, should be included in calculating the Respondent's gross annual income.[6]

The inclusion of the dancers' tips and lap dance fees in the Respondent's gross revenues is not only warranted under the taxicab cases discussed above, it is also fully compatible with the Board's approach, in determining an employer's gross annual income for discretionary jurisdiction purposes, of considering the overall scope of the employer's business enterprise itself, rather than just the employer's own receipts. In *Pit Stop Markets*, 279 NLRB 1124 (1986), for example, the Board held that the total amount of the gasoline sales at the employer's premises were includable in the employer's gross revenues although all proceeds from the sale of gasoline were passed on to the gasoline supplier which then remitted a commission to the employer as its share of the gasoline sales. As the Board explained, "it is the gross volume sales amounts to which the Board looks in determining jurisdiction, not profit margin or some other yardstick." Id. at 1125. Likewise in the present case, where the dancers produce the "product" that is the essential business of the Respondent, i.e, their exotic dances, a calculation of the Respondent's gross volume sales amount should include the tips and fees from the sale of the Respondent's product, the dances.

Further, *Love's Wood Pit Barbecue Restaurant*, 209 NLRB 220 (1974), the case which the judge found was analogous to the present case, and on which she relied to find that the dancers' compensation should not be included in the Respondent's gross annual income, is inapposite. In that case, the issue was whether the amount of the meal credits and tip credits which the employer deducted from its waitresses' paychecks should be included in calculating the employer's gross annual income. While the Board found that these amounts should not be so included, that finding has no relevance here because the issue there, unlike here, was whether amounts which the employer *deducted* from paychecks should be attributable to the employer in determining gross annual income.

Finally, while the judge apparently relied on the statement in *Love's Wood Pit Barbecue Restaurant*, 209 NLRB at 220, to the effect that the tips themselves were not included as part of the Employer's gross volume of sales or otherwise treated as income, to find that the tips here, and, by extension, the lap dance fees, should not be included in the Respondent's gross annual income, the judge's reliance is misplaced. As explained above at footnote 2, the term "tips" in the present case is not used in the same way that it is used in *Love's Wood Pit Barbecue Restaurant*. In *Love's Wood Pit Barbecue Restaurant*, the tips which the waitresses received were in addition to the pay which they received from the employer.

[5] Indeed, the judge in *Major Cab Co.* relied, inter alia, on the Board's decision in *Supreme*, supra, as support for the proposition that "[g]ross receipts of all drivers [the employees] is an appropriate method of determining whether or not a taxicab company [the employer] satisfies the Board's discretionary standard." *Major Cab Co.*, 255 NLRB at 1384 fn. 7. While the judge stated in her decision here that there is no evidence in *Major Cab* regarding whether the drivers retained their fares, as explained at fn. 6 below, that is not the issue. The issue is whether the drivers passed their fares on to the company. Contrary to the judge, I find that the judge's inclusion in *Major Cab* of an explanation of why it was appropriate to include the fares of the drivers in calculating the Respondent's gross annual income, and his reliance on *Supreme* in that discussion, warrant a finding that the drivers in *Major Cab*, as in *Supreme*, did not pass their fares on to the taxicab company.

[6] In finding to the contrary, the judge erred by relying on the Board's discussion of the soundness of its projections as to the drivers' gross income in *Supreme*, supra, to find that that discussion "refutes any idea that the drivers retained their fares." Judge's decision at fn. 17. The drivers did indeed pass their fare receipts on to the taxicab owners, but the owners, contrary to the judge's apparent conclusion, were not the companies. As explained above, the Board specifically found in *Supreme* that the owner-drivers and rent-drivers were employees of the taxicab companies. Thus, the fact that the drivers passed their fares on to the taxicab owners, or, as the judge put it, that the drivers did not retain their fares, is analytically immaterial to the issue presented. The issue here is whether, in fact, the taxicab owners and drivers passed their fare receipts to their employer, the companies. As shown above, they did not.

In the present case, the tips and lap dance fees are the dancers' sole income.

In sum, *Supreme* and *Major Cab* fully support a finding that the dancers' tips and fees should be included in the Respondent's gross annual income for the purpose of determining whether the Respondent satisfies the Board's discretionary jurisdiction standard. The inclusion of the dancers' tips and fees is fully justified because, as the Board explained in *Pit Stop Markets*, the Board considers an employer's "gross volume sales amounts" in determining whether the employer satisfies the Board's discretionary jurisdiction standard. This is because the purpose of the Board's discretionary standards is to determine whether the Respondent does sufficient business, in the aggregate, for us to conclude that any unfair labor practices it has committed could have had enough of an effect on interstate commerce that it would effectuate the purposes and policies of the Act for us to take jurisdiction. In this case, the monies received by the dancers, who are the essence of the Respondent's business, must be included for us to make that determination. As set forth above, this result is fully compatible with Board precedent. As established by the taxicab cases, it is immaterial whether or not the receipts first pass through the hands of the employer before they are received by the employees as compensation. And in my view, by failing to include the dancers' receipts, the judge and the majority have abdicated their responsibility in this case to look at the totality of the Respondent's business in order to determine whether, in our discretion, we should assert jurisdiction and decide the unfair labor practice allegations. An examination of the total receipts of the Respondent's business in this case leads to the inescapable conclusion that we should indeed assert jurisdiction.

For all these reasons, I would reverse the judge's dismissal of the consolidated complaint, reinstate the consolidated complaint, and remand the case to the judge for resolution of the unfair practice violations alleged therein.

Dated, Washington, D.C. December 20, 2001

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

Margaret M. Dietz, Esq., for the General Counsel.
Robert Leinwand, Esq. and *Bethany M. Kaye, Esq. (Littler Mendelson),* of San Francisco, California, *for the Respondent.*

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. These cases were tried in San Francisco, California on June 22–25 and July 12–13, 1999. Hima Narumanchi, an individual, filed the charge in Case 20–CA–28393 on March 30, 1998. Tracey Buel, an individual, filed the charge in Case 20–CA–28525 on June 12, 1998. The consolidated complaint issued on March 17, 1999, alleges that Jon Bruni, Inc. d/b/a Temptations (Respondent) violated Section 8(a)(1) of the National Labor Relations Act[1] by terminating Narumanchi and refusing to reinstate Buel because of their activities on behalf of the Exotic Dancers Alliance and other protected, concerted activity. At the close of the General Counsel's case in chief, Respondent moved to dismiss. The hearing was adjourned to consider the motion. For purposes of ruling on this motion, the evidence will be viewed in a light most favorable to the General Counsel.

Three issues are raised by the motion to dismiss: whether Narumanchi and Buel are employees within the meaning of Section 2(3) of the Act;[2] if so, whether Respondent meets the Board's retail jurisdictional standard; and, if so, whether Respondent's actions were violative of the Act.

The parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions. On the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by counsel for the General Counsel and counsel for Respondent, I make the following

FINDINGS OF FACT

The two jurisdictional issues raised by Respondent, employee status and gross volume of sales, are somewhat connected. Counsel for the General Counsel concedes that if the exotic dancers are not employees within the meaning of Section 2(3) of the Act, their tips may not be attributed to Respondent and, thus, Respondent will not have sufficient gross volume of business to satisfy the Board's discretionary retail standard. Accordingly, initially it must be determined whether the exotic dancers meet the statutory definition of employee, as General Counsel contends, or whether, on the other hand, they are independent contractors, as Respondent asserts.

I. JURISDICTION—EMPLOYEE STATUS

Overview

Located in the North Beach area of San Francisco, California, Respondent operates a club providing erotic performances

[1] Sec. 8(a)(1) prohibits an employer from interfering with, restraining, or coercing employees in the exercise of their rights, inter alia, to self-organization and to engage in activities for their mutual aid and protection.

[2] Sec. 2(3) of the Act provides, inter alia, "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise . . . but shall not include . . . any individual having the status of an independent contractor. . . ."

[3] All evidence has been viewed in a light most favorable to the General Counsel's theory of the case based upon a review of the entire record and all exhibits in this proceeding.

of lap dancing and nude stage dancing.[4] The club opened in April 1997. After an initial interview and audition, exotic dancers are engaged by Respondent to perform at the club. Dancers pay Respondent a stage fee of $50 (originally $40) each evening that they perform.[5] Generally, at opening time, Respondent conducts a "roll call" to introduce the dancers and then a rotation of the dancers begins in which each dancer strips on stage. Dancers are then free to contract with customers on an individual basis to provide lap dances. Dancers supply their own music,[6] costumes and stage props. At the time of hire, dancers confer with Respondent about scheduling. However, dancers may report to the club when not scheduled. If there is room on the schedule to accommodate the additional dancer, she is free to appear. Respondent charges a premium of $20 over the usual stage fee for unscheduled appearances.

Legal Framework

In order to determine whether an individual's relationship with an employing entity creates a master-servant relationship or an independent contractor relationship, general common law agency principles apply. *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968). Application of common law agency principles requires that all facets of the relationship be examined and weighed. No one factor is determinative. The Court[7] and Board[8] rely on the multifactor analysis set forth in the Restatement (Second) of Agency, Section 220, as follows:

> § 220. Definition of Servant
>
> (1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.
>
> (2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:
>
> (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
>
> (b) whether or not the one employed is engaged in a distinct occupation or business;
>
> (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
>
> (d) the skill required in the particular occupation;
>
> (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
>
> (f) the length of time for which the person is employed;
>
> (g) the method of payment, whether by the time or by the job;
>
> (h) whether or not the work is a part of the regular business of the employer;
>
> (i) whether or not the parties believe they are creating the relation of master and servant; and
>
> (j) whether the principal is or is not in business.

Application of Legal Principles

a. *Extent of control*: Dancers complete an information sheet and are auditioned before they may perform at the club. Dancers' days of work are scheduled according to the dancers' preferences, as far as possible, within the framework of the club's hours of operation. However, in order to obtain scheduling for weekend performances, the dancer must work at least 1 day during the week. Once scheduled, Respondent requires that the dancers participate in "roll call" at the beginning of the evening and sometimes later in the evening. Generally, at the beginning of each evening and throughout the evening, a "rotation" of dancers also takes place. The order of appearance in "rotation" is the same order that the dancers arrive at the club that evening. Occasionally, Respondent alters the appearance order to provide diversity in the order of dancers. Lap dancing fees are subject to negotiation between the dancer and the client. However, Respondent has cautioned dancers when it learns the dancers have "undercharged" or "overcharged" customers. Occasionally, Respondent runs a "2 for 1" special on lap dancing pricing. Dancers are encouraged and sometimes required to participate on stage in "bachelor boy" and "birthday boy" performances. Additionally, Respondent requires that dancers be ready to go on stage at opening time. If ready, dancers are entitled to a discounted stage fee. If more than 15 minutes late, dancers are subject to a fine, in theory. According to Respondent, the fine was announced but never imposed. Respondent does not select or require specific costumes or specific dances. The evidence reflects that the dancers utilize their own discretion and artistic preferences with regard to these matters. Dancers are, however, required to totally strip during their appearance in the "rotation." Dancers furnish their own music although the club has a selection of music which may be utilized as well. Respondent restricts the amount of Rap, Hip-Hop, and Rhythm and Blues music which may be utilized during the evening. Respondent requests the dancers to tip the disc jockey at the end of each shift. Respondent does not allow dancers to return to the club when it discovers acts of prostitution. Based upon these facts, I find that Respondent does exercise an attenuated control over the physical conduct of the dancers and certainly retains a right to control the conduct of the dancers.

b. *Distinct occupation or business*: Dancers are free to pursue outside business activities as long as it does not interfere with their schedule for Respondent. Although, some dancers operate as sole proprietorships for purposes of taxes and accounting, there is no evidence that dancers exercise entrepreneurial choice in pursuing other business opportunities besides dancing at other clubs. Essentially, the dancers perform in a club atmosphere in order to earn a livelihood through exotic dancing. They do not appear to be retained by Respondent in order to exercise care and skill in accomplishing a specific result. Rather, the dancers are apparently a function of the club and their sole initiative is limited to selection of costumes and dance routines. In this framework, based upon the record evidence before me, I find that exotic dancers do not constitute "a distinct occupation or business" as envisioned in the Restatement.

[4] Respondent operated two sole proprietorships until July 1, 1997. At that time, both operations were incorporated as Respondent.

[5] During the first month of operation, the stage fees were waived by Respondent.

[6] Respondent limits the amount of Rap, Hip-Hop, and Rhythm and Blues music allowed each evening.

[7] *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 fn. 31 (1989).

[8] *Roadway Package System, Inc.*, 326 NLRB 842, 848–850 (1998); *Dial-A-Mattress Operating Corp.*, 326 NLRB 884 (1998).

c. *Kind of occupation*: Exotic dancing may be viewed as an artistic endeavor in which the club has neither the knowledge nor desire to interfere but which is incident to the business establishment of Respondent. Moreover, the occupation "exotic dancer" is not one that may be viewed as a "specialist," at least in the context of club performances. Rather, I find that the occupation is one customarily viewed in the employer-employee context.

d. *Skill*: Exotic dancers are not required to have prior training or experience. The work of exotic dancing does not require the services of one highly educated or highly skilled. This is not to say that individual dancers may not study choreography and that individual dancers are not artistically skillful. Rather, it is merely to note that these attributes are not requirements of the occupation. The dancers must also exercise a degree of sales strategy and must be able to exert control, if necessary. However, this is not the kind of skill indicative of an entrepreneur. On balance, lack of skill is a factor mitigating toward an employer-employee relationship.

e. *Ownership of instrumentalities, tools and place of work:* Respondent provides the physical space for the performance of exotic dancing. Dancers are charged a stage fee for use of the stage space and dancers provide the music and costumes for their performances. I find little probative value may be drawn from the totality of the ownership arrangements in the context of the club. On the one hand, exotic dancers "rent" their working space and provide their costumes and props. On the other hand, Respondent furnishes the place of work and the sound system.

f. *Length of employment*: Dancers tend to stay with Respondent for relatively short periods of time, generally about 3 months, and not exceeding 1 year. At the time of audition, no tenure for the relationship is discussed. The lack of a stated length of employment could be viewed as envisioning steady employment over a period of time. There is nothing to indicate that dancers are hired to perform a specific, defined project. There is no evidence of a discipline system or a grievance procedure. There is no employee handbook. Nevertheless, on balance, these factors slightly favor the finding of an employee-employer relationship

g. *Method of payment*: Dancers are not paid a salary or hourly rate by Respondent nor does Respondent provide any benefits to the dancers. Dancers contract a specific fee with clients for individual lap dance performances and earn tips for stage performances. Respondent does not know the amounts earned by the dancers and does not receive any portion of these fees or tips. For tax purposes, Respondent treats the dancers as independent contractors. In fact, the dancers pay the employer and they assume the entrepreneurial risk as to lap dancing. These factors are indicative of an independent contractor relationship. However, Respondent suggests the price for lap dances and, on occasion, Respondent offers 2 lap dances for the price of 1 lap dance. This is done without consulting the dancers. Due to Respondent's intrusion in the pricing of lap dances, I find that the method of payment factor is entitled to comparatively less weight than if the dancers were entirely free to set prices.

h. *Regular part of the business*: The functions performed by the dancers are essential to Respondent's business operations. Simply put, absent exotic dancers, Respondent would not be in business. This strongly supports the finding of an employee-employer relationship.

i. *Belief of the parties*: Respondent tells dancers that they will be treated as independent contractors. Respondent requests that the dancers obtain a business license. Dancers testified that they felt they were employees. These beliefs in effect cancel each other and are given no weight due to the self-serving nature of the assertions.

j. *Principal's business*: The principal in this case is Respondent and Respondent is in business as a club providing erotic dance performances. The dancers "are" the business.

Weighing these factors, it appears that the exotic dancers are employees rather than independent contractors.[9] Dancers' physical activities and time are subject to Respondent's control. For instance, dancers are told when to report to the club, are given a roll call and rotation assignment and are advised regarding the amount of the costume which must be removed in a strip routine. The dancers are expected to "hustle" customers in order to sell lap dance performances. However, Respondent plays a significant role in drawing customers into the club. Respondent, for instance, controls advertisement, location of the club, hours of business, maintenance and décor of the facility, and service of beverages. Given Respondent's control over the determining factors of customer volume and demographics, Respondent exercises a high degree of control over the dancers' profit opportunities. This control substantially reduces any opportunity for entrepreunerial risk taking. Exotic dancers are not a highly skilled occupation. Without the exotic dancers, Respondent would not be in business. They are an integral part of the club's existence. I find that these factors far outweigh the significance of other indicia which lend support to an independent contractor status; i.e., the method of payment, ownership of the costumes and music, and rental of the stage, all of which are relatively minor as compared to the facility and sound system. Based upon this finding, it is therefore necessary to consider whether Respondent meets the Board's discretionary retail standard.

II. JURISDICTION—GROSS VOLUME OF BUSINESS

Overview

The parties agree that the Board's discretionary retail standard ($500,000 in gross revenues) applies[10] and stipulate that Respondent's gross revenues for calendar year 1997 were $352,221.96.[11] General Counsel contends that dancers' tips and

[9] Cf., *Strand Art Theatre*, 184 NLRB 667 (1970). In *Strand*, the Board found a vaudeville team (a comedian and an exotic dancer) were independent contractors based upon the "right to control" test. The "right to control" test was subsequently rejected in *Standard Oil Co.*, 230 NLRB 967, 968 (1977). See also, *The Comedy Store*, 265 NLRB 1422 (1982), relied upon by Respondent, finding that Mitzi Shore's suggestions to comedians performing at the Comedy Club were to be accorded weight attributable to her status and position as "well-conneceted." The Board held that Respondent did not control the manner and means of the comedians' performances. Id., 265 NLRB 1422 at fn.1. I find *The Comedy Store* distinguishable due to the weight accorded Respondent's "suggestions" by the Board in addition to the distinctions between the two occupations and skill levels.

[10] Generally, the retail standard applies to the amusement industry. See, e.g., *Ray, Davidson & Ray*, 131 NLRB 433 (1961); *Coney Island, Inc.*, 140 NLRB 77(1963); *Aspen Skiing Corp.*, 143 NLRB 707 (1963).

[11] This amount includes stage fees, fines, sales tax, admission fees, nonalcoholic beverage sales, and user fees derived from the use of an ATM machine on the premises. There is no issue as to statutory jurisdiction. Respondent admits that during calendar year 1997, it purchased

fees, that is, the tips paid by customers directly to dancers for dancing on stage plus the fees for individual lap dance performances, allegedly in excess of $150,000 for the calendar year, should be added to the stipulated amount in order to qualify Respondent's operations under the Board's retail standard. Respondent disagrees that the tips and fees exceeded $150,000 and, in any event, asserts that these tips and fees are not properly included in its gross revenues. Before determining whether the tips and fees should be included, it is necessary to ascertain whether there is a sufficient monetary amount to consider.

Contentions regarding calculation of fees and tips

Counsel for the General Counsel contends that the estimates of tips and fees provided by witnesses at the hearing for all shifts worked during calendar year 1997 establishes that at least $147,778.04 (the amount needed to meet the $500,000 threshold) was earned in tips and fees.

Respondent contends that there is no reliable evidence upon which to estimate the amounts of tips and fees. Respondent asserts that all dancers unanimously agreed that tips and fees varied depending on a variety of factors including the individual dancer's appearance, skills and sales ability, the number of other dancers working that evening, the day of the week, time of year, and weather conditions. Respondent also notes that although it subpoenaed income tax returns for both charging parties, no such returns were produced because the charging parties asserted that they did not file tax returns. Respondent questions the veracity of this assertion and asks that it be discredited, that any other less reliable evidence be rejected, and that, consistent with *Tropicana Products,* 122 NLRB 121 (1958), the evidence be construed against the charging parties. Moreover, Respondent contends that all dancers who testified provided highly improbable testimony regarding their tip income.

Discussion regarding calculation of fees and tips

Prior to April 1997, Respondent utilized the club premises as a video arcade and sex novelty store. Respondent also provided some limited conversation booth activity. In addition, until January 31, 1997, Respondent sold office supplies. In February or March 1997, the club was remodeled for its current use and opened in this form on April 23, 1997. Since April 1997, Respondent's proceeds have been from operation of the club.

Although there is substantial disagreement between the parties regarding the number of dancers working each evening and the amount of tips received by these dancers each shift, the simple mathematics of the situation overcomes these arguments. Utilizing the average of Respondent's estimates for number of dancers working each evening, at least 40 dancer shifts per week,[12] and utilizing the lowest average estimate of nightly tips and fees after deduction of the stage fee, $100,[13] the amount of tips and fees from April 23 to December 31, 1997, excluding Christmas Day (36 weeks) is approximately $162,000.[14] This sum is sufficient, when added to the stipulated amount ($352,221.96), to meet the retail standard.

Contentions regarding inclusion or exclusion of fees and tips

Counsel for the General Counsel relies by analogy upon *Major Cab Co.,* 255 NLRB 1383, 1384 (1981); *Supreme, Victory and Deluxe Cab Cos.,* 160 NLRB 140, 141, 144–146 (1966), and *Checker Cab Co.,* 141 NLRB 583, 587 (1963). In these cases, fares paid by customers to the taxi drivers, employees within the meaning of the Act, were included in determining gross revenue of the taxi company.[15] Counsel for the General Counsel asserts that the drivers retained their fares but these fares were nevertheless counted in gross volume of business and argues that the dancers' fees and tips should likewise be counted.

Respondent contends that dancers' fees and tips should not be counted as gross revenue because they are not income to Respondent. Respondent relies on *Love's Wood Pit Barbeque Restaurant,* 209 NLRB 220 (1974), holding that tips, meal credits and tip credits were an integral part of employee wage packages and not appropriately included in gross annual volume of business. Respondent argues that dancers do not share a percentage of their fees and tips with Respondent and do not report these earnings to Respondent. Accordingly, the fees and tips should not be included to Respondent's volume of business.

Further, General Counsel and Respondent both rely on *Pit Stop Markets,* 279 NLRB 1124 (1986). There the Board explained that it looked to gross volume of sales amounts in determining jurisdiction, rather than profit margins. Pit Stop Markets sold groceries and gasoline. However, it did not own the gasoline and received only a net profit in commissions from the gasoline supplier. Pit Stop Markets contended that the amount

and received goods valued in excess of $2500 which originated from points outside the State of California.

[12] After filing its tax returns, and unrelated to any events in this case, Respondent destroyed its records which would have shown the number of dancers who paid stage fees each night. Accordingly, estimates must be relied upon. On Monday through Wednesday, Respondent's owners estimated, respectively, there were either 5 or anywhere from 5 to 7 dancers (average 5.5). On Thursday, there were either 6 to 7 *or* 5 to 8 dancers (average 6.5). On Friday, there were usually 7 to 10 or as many as 11 or 12 *or* 5 to 10 or 11 (average 8.25). On Sunday, there were 7 to 10 or 12 *or* 5 to 12 (average 8.75). On Sunday, there were 5 to 6 (average 5.5). Using the average of these amounts (Monday-Wednesday, 5.5; Thursday, 6.5; Friday, 8.25; Saturday, 8.75; Sunday, 5.5), it is concluded that there are a minimum of 45 dancing shifts per week.

[13] Estimates of nightly tips and fees varied wildly. However, it is possible that a wild variation existed among dancers' earnings. No records were retained by Respondent or the dancers. Some dancers admitted that there were rare evenings when they did not make enough money to cover the stage fee. Buel testified that she usually averaged $100 each evening. The most she made in one evening was $250. One time she did not earn enough to cover the stage fee. Dancer Kitaka Gara testified that she averaged $460 to $560 each evening. Dancer Kristina Zinnen testified that she always earned enough to cover the stage fee and her earnings ranged from $20 to $40 on slow nights to $200 to $250 on better nights. For purposes of this calculation, I will utilize Buel's estimate as it is lower than those of the other dancers are. One hundred dollars in earnings per evening computes as an average hourly rate of $12.50.

[14] Generally, where no annual figures are available, figures for a period of less than 1 year, such as the amount of tips and fees for the 36-week period, may be projected to obtain an annual figure. See, *Carpenter Baking Co.*, 112 NLRB 288 (1955). Although it is unnecessary to rely on such a projection in this case, if the amount of fees and tips was annualized, the amount would be $234,000.

[15] Respondent distinguishes *Major Cab, Checker Cab, and Supreme Cab, supra,* because in those cases the taxi drivers were statutory employees. Respondent also notes a trend to find taxi drivers independent contractors rather than employees, citing *Air Transit,* 271 NLRB 1108 (1984), enf. denied, 679 F.2d 1095 (4th Cir. 1982); *Checker Cab Co,* 273 NLRB 1492 (1985); and *City Cab Co.,* 285 NLRB 1191 (1987).

of commission for gasoline sales, rather than the gross volume of sales, was more appropriately considered for jurisdictional purposes. The Board disagreed and held that whether the employer bought gasoline from a supplier and received a return on its investment or received a commission from the supplier for the amount of gasoline sold was immaterial. The sum which most accurately represents the true amount of business conducted at the employer's operations is the sales amount.

Yet it is gross volume sales amounts to which the Board looks in determining jurisdiction, not profit margin or some other yardstick. . . . Whether the Employer buys gasoline from its suppliers and receives a return on investments (as it apparently does with groceries), or receives a commission from the supplier for the amount of gasoline sold, the result in both situations is that the Employer receives gross revenues and obtains net income from the sale. It is clear to us that the Employer is involved in interstate commerce and meets the Board's jurisdictional standards.

Respondent contends that in order for a sum to qualify as a part of gross volume of business, the employer must receive the money from the sale and obtain net income for the sale to count towards gross income. Because it does not receive any of the fees and tips, it contends, pursuant to *Pit Stop Markets* that these amounts do not represent sales amounts attributable to it. General Counsel argues that pursuant to *Pit Stop Markets,* the "sales" of lap dances occur at the club and are therefore attributable to Respondent.

Discussion regarding inclusion or exclusion of fees and tips

None of the authorities cited is clearly controlling. In part, this is due to the unique wage framework utilized by the club.

Contrary to General Counsel's assertion, it is not possible to analogize the taxicab fares in *Major Cab, Checker Cab,* and *Supreme Cab* to the lap dancing fees. Two reasons preclude such analogy. First, it is apparent from the decisions in those cases that the taxi drivers (statutory employees) did not retain the taxi fares. Rather, the taxi drivers turned the fares over to their employers and were compensated on an hourly or commission basis. Second, the actual issue of whether the fares were properly included in gross volume of business was not litigated in the initial case. It was a matter of stipulation between the parties. Nevertheless, that stipulation was relied upon in later cases.

For instance, in the first of these cases, *Checker Cab,* supra, 141 NLRB 583, the issue was whether Checker Cab and its members were joint employers. Pursuant to a stipulation, the parties agreed that in the course of operating 900 cabs owned by Checker Cab members, the combined gross revenue received as fares for taxicab services was $7 million. Each member hired and discharged his drivers and individually bargained regarding wages and hours with his drivers. Each member maintained his own payroll. Accordingly, a strict reading of *Checker Cab* does not address whether the fares are properly included in gross volume of business because this was not a litigated issue. Moreover, even if the issue had been litigated, there is nothing in the decision to indicate that drivers retained the fares. In fact, because the members individually bargained with their drivers regarding wages, it would appear that the fares were not retained by drivers. If this was the case, the facts are not analogous to those herein.

In *Supreme Cab,* supra, 160 NLRB 140, the Board initially examined whether an employment relationship existed between the taxi companies and the taxi drivers. Upon finding this issue affirmatively, the Board turned to the independent contractor issue and found pursuant to the "right to control" test[16] that the drivers were employees. The Board then stated, "Accordingly, consideration of the gross receipts of all drivers is appropriate in determining whether the Companies' volume of business satisfies our jurisdictional standard." Id., 160 NLRB at 144. In support of this assertion, the Board cited *Checker Cab,* 141 NLRB 583, 584, 587. Id. 160 NLRB at fn. 12. Upon examination of the gross receipts of all drivers, the Board held that its discretionary jurisdictional standard had been met. Moreover, the Board noted that in any event, because there was an absence of company records to refute the basis of the computations (estimates by drivers who also had no records), it would effectuate the policies of the Act to assert jurisdiction where legal jurisdiction had been established. The decision clearly states that the drivers did not retain the fares but passed the fares on to the taxi companies.[17]

Finally, in *Major Cab Co.,* 255 NLRB 1383 (1981), relying on *Checker Cab* and *Supreme Cab,* supra, the Board found gross receipts of drivers an appropriate method of determining whether or not a taxi company satisfies the Board's discretionary standard. There is no evidence recited in the decision regarding whether the drivers retained the fares. These cases are analogous to the facts herein only if one assumes that the taxi drivers retained the fares but the fares were nevertheless counted as gross receipts to the employer. This assumption appears unwarranted and, accordingly, I reject the taxi cases as appropriate authority.

Turning to the tip component of the dancers' wage, it is possible to draw parallels between stage tips of the dancers herein and the tips of the waitresses in *Love's Wood Pit Barbeque Restaurant,* supra, 209 NLRB 220. This analogy leads to the conclusion that the dancers' stage tips, at least, should not be included in gross volume of business. *Love's Wood Pit Barbeque Restaurant* indicates that these amounts are part of the wage structure and do not count as gross sales. Accordingly, as to stage tips, I find that they should not be included in gross volume. Although, the lap dancing fees are not within the parameters of the holding in *Love's Barbeque* it is nevertheless possible to analogize them to tips as they are also part of the wage structure.

Pit Stop Markets, supra, 279 NLRB 1124, is capable of various interpretations. The Board affirmed the Regional Director's finding that lack of title to the goods sold was immaterial for jurisdictional purposes. This holding has no direct application to the facts of the instant case. However, the Board emphasized that "the true amount of business conducted at the Employer's operation" is the crucial factor. That statement is interpreted by

[16] Until 1977, the Board utilized a "right to control" test in determining whether an employer-employee relationship existed. The "right to control" test emphasized analysis of the details of daily performance of work. In *Standard Oil Co.,* 230 NLRB 967 (1977), the "right to control" test was rejected in favor of the common law agency test.

[17] The Board's discussion of the soundness of the projections it made refutes any idea that the drivers retained the fares. The drivers' receipts were estimated at $535,752 per year. The Board noted that annual franchise fees and gasoline costs must be deducted from this amount leaving $313,752 or about $3200 per taxi. "Out of this $3200 figure the owners necessarily must obtain sufficient money to cover the cost of depreciation, repairs, new tires, and batteries. And out of this same figure at least 48 full-time drivers and some 67 part-time drivers must derive earnings for their work." 160 NLRB at 146.

counsel for the General Counsel as support for inclusion of lap dancing fees, earned on the premises, as a part of gross volume. At another point, the Board stated that receipt of gross revenue and receipt of income are the factors which determine whether an amount is included in gross volume of sales. If "receipt" is the criteria, then lap dance fees should not be included because Respondent does not ever "receive" the fees or tips.

Balancing the existing precedent and the policies underlying discretionary jurisdictional standards, I conclude that *Love's Wood Pit Barbeque Restaurant* is the most applicable precedent. Pursuant to that precedent, neither tips nor the lap dancing fees should be included in gross volume of sales. Given my finding that the dancers are employees, it is clear that the lap dancing fees are an integral part, in fact, the sum total of the dancers' wage package. Application of *Love's Wood Pit Barbeque Restaurant,* supra, indicates that the tips are not included in the gross annual volume of business. Rather, these amounts are a means of compensating employees for their services. Extension of this rationale leads also to exclusion of lap dancing fees from annual gross volume of business. Without inclusion of these fees, Respondent does not meet the discretionary retail standard. Accordingly, I find that it does not effectuate the purposes of the Act to assert jurisdiction in this case. Under these circumstances, it is unnecessary to reach the these circumstances, it is unnecessary to reach the third issue raised by the motion to dismiss: the merits of the case.

CONCLUSIONS OF LAW

1. The exotic dancers who work at Respondent's club are employees within the meaning of Section 2(3) of the Act.

2. The tips and fees earned by exotic dancers are not properly included in Respondent's gross volume of business. Accordingly, Respondent's gross volume of business is insufficient to meet the Board's discretionary retail standard. Respondent is not an employer within the meaning of Section 2(2), (6), and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

Respondent's motion to dismiss is sustained. The complaint is dismissed.

Dated, November 2, 1999

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.